

BEFORE
THE PUBLIC SERVICE COMMISSION OF
SOUTH CAROLINA
DOCKET NO. 96-168-W/S - ORDER NO. 2000-927
NOVEMBER 13, 2000

IN RE: Application of Kiawah Island Utility, Inc. for) ORDER DENYING
Approval of an Increase in its Rates and) REHEARING AND
Charges for Water and Sewer Services.) RECONSIDERATION

This matter comes before the Public Service Commission of South Carolina (the Commission) on an Amended Petition for Rehearing and Reconsideration of Order No. 2000-713 filed by the Kiawah Property Owners' Group (KPOG) and the Town of Kiawah Island, South Carolina (the Town)(collectively the Petitioners).

The major concern stated by the Petitioners is that Order No. 2000-713 does not address KPOG's concern underlying most of the issues contested in the case, which is the question as to whether or not transactions between the developer, Kiawah Resort Associates, L.P. (KRA) and the utility, Kiawah Island Utility, Inc. (Kiawah or the Utility) are "arms length" transactions. The Petitioners allege that they are not, and since the management of the two entities is the same, there is no independent protection of rate payers' interests when inter-company transactions between KRA and KIU are involved. The Petitioners further state that when KRA charges costs and expenses to KIU, KRA's profits and cash position increase. In addition, the Petitioners allege that if such charges are allowed for ratemaking purposes, the ratepayers pay for them, and the interest

expense on any debt incurred by KIU in order to pay KRA. However, the Petitioners state that if the charges are disallowed for ratemaking purposes and KRA is not required to repay KIU, then the ratepayers still pay for the interest expense on the debt, but the cash ends up with KRA.

First, we would state that with regard to affiliate transactions between a utility and its parent company, we are governed by Hilton Head Plantation Utilities, Inc. v. The Public Service Commission of South Carolina, 312 S.C. 448, 441 S.E. 2d 321 (1994). There are several principles of law found in this case. First, although expenses of a public utility are presumed to be reasonable when incurred in good faith, when payments are made by a regulated public utility to an affiliate, the mere showing of actual payment does not establish a prima facie case of reasonableness. Further, the case holds that the payment of unexplained expenses to affiliates did not entitle the water and sewer utility in the case to request an increase in rates and charges. The converse of this principle is that when the utility can explain the payment of expenses to affiliates, the utility may be entitled to request an increase in rates and charges, all other things equal. We would note that the application of both sides of this principle are evident in our holdings in Order No. 2000-713, which will be examined infra.

Second, we would note that the Petitioners suggest that this Commission has jurisdiction to order KRA to repay KIU funds disallowed for ratemaking purposes. We would note that we only have jurisdiction over public utilities. S.C. Code Ann. Section 58-5-210 (1976) states that "The Public Service Commission is hereby, to the extent, granted, vested with power and jurisdiction to supervise and regulate the rates and service

of every public utility in this State, together with the power, after hearing, to ascertain and fix such just and reasonable standards, classifications, regulations, practices and measurements of service to be furnished, imposed, observed and followed by every public utility in this State and the State hereby asserts its rights to regulate the rates and services of every “public utility” as herein defined. (emphasis added) There is no additional statute or authority that gives this Commission jurisdiction over any non-utility affiliate company. Therefore, the Commission has no authority whatsoever to order an affiliate company to pay back any funds to a utility, as is espoused by the Petitioners. The Commission’s authority rests solely over the public utilities themselves. Therefore, we are limited to granting in whole or in part, or denying proposed adjustments in utility rate cases, based on our view of the evidence in a particular case.

First, the Petitioners take issue with the Commission’s holding as to management fees, and assert that Order No. 2000-713 does not address KPOG’s stated concern, which is “the need for the repayment of the excess amounts charged KIU by KRA over the amounts allowed by PSC, plus interest.” As the Petition notes, and as stated above, KRA is not under this Commission’s jurisdiction, accordingly, we have no power to order KRA to repay funds to KIU. Further, the Petitioners state that this Commission failed to properly account for management fees paid KRA by the Utility by only reducing KRA’s requested amount from \$100,000 to \$36, 000, because, in the view of the Petitioners, the utility/KRA did not properly justify any amount in management fees. Further, the Petitioners state that the Commission failed to adjust for out of period expenses.

In Order No. 2000-713, we acknowledged the Hilton Head Plantation Utilities standard, and found that the Company had not furnished sufficient data to ascertain the reasonableness of the entire management fee amount. However, based on the testimony of Staff witness Maready and KPOG's witness at the hearing, we found that the Company had justified \$36,000 out of the requested \$100,000 for ratemaking purposes. First, it should be noted that KPOG's own witness proffered an adjustment at the original hearing of the case that would allow recovery of the \$36,000 annually in rates, although it is admitted that KPOG took an alternate position that the entire amount should be excluded. Second, no "out of period" adjustment was proper. As per the Commission's holding, only \$36,000 of the \$100,000 management fee per year could be charged to the ratepayers. The Petitioners are simply incorrect that the additional funds are significant for ratemaking purposes. Once again, as the Petitioners acknowledge, the Commission has no jurisdiction over KRA in any event, and has no authority to order that parent company to pay back any monies to the utility in any event. The Petitioners allegations with regard to management fees are without merit.

Next, the Petitioners challenge this Commission's holding on rental expense for land leases. Although KPOG does not challenge the reasonableness of the lease amount or the fact that the property was "used and useful," KPOG asserts that there should not have been any leases and that all rent payments and interest should be refunded to the Utility. KPOG further states that the land should have been donated to the Company as a contribution in aid of construction, or the Company should have required KRA to pay an impact fee equal to the value of the land. KPOG alleges that, this is a "standard practice"

of non-developer owned water and sewer utilities in South Carolina, and should therefore be followed. KPOG also raises the specter of non-arms length transactions.

KPOG puts forth some novel ideas in its Petition. As was stated in Order No. 2000-713, the evidence was clear that the property in question was used and useful to the utility, and that the lease values were reasonable for additional storage for treated effluent from the wastewater treatment provided by the Company, as per the evidence submitted in the case. There is no rule that states that land for this purpose must be donated, or that an impact fee should have been assessed. We would note that the amounts for the leases were reasonable and therefore approvable under the Hilton Head Plantation Utilities standard. Even though KRA and KIU had common signatories on the leases, the finding of reasonability of the expenses, which is admitted by KPOG, shows that the transactions were arms length in effect. Similar reasoning is applicable to the Commission's treatment of the Down Island storage facility, even though it may not have been included in the application before the Commission originally. While admittedly, the leases in question had not been submitted to the Commission for approval in advance, the Commission allowed the expenses for ratemaking purposes, due to the used and useful nature of the property, and the reasonability of the proffered expenses.

The Petitioners cite S.C. Code Ann. Section 58-27-290 (Supp. 1996) for the proposition that the Utility must make an affirmative showing of the reasonableness, fairness, and absence of any injurious effect upon the public of any fees or charges growing out of any transaction between a utility and an affiliated company. We find no such statute, although we certainly generally agree with the proposition. We think that the

Utility made the affirmative showing as described in the present case, and the grounds for exclusion cited by the Petitioners are not valid.

Further, the Petitioners disagree with our holding in Order No. 2000-713 on unidentified assets. We would note that this Commission presented an in-depth discussion on this issue on pages 21 through 25 of that Order, which we herein incorporate as fully as if printed herein verbatim. Once again, KPOG seems to believe that the ratepayers are in some way paying for the assets that were excluded and/or a portion of the interest on a bank loan not approved by the Commission for ratemaking purposes. If only \$29,655 of loan interest was approved via interest synchronization, that is all that the ratepayers are responsible for paying. They are not responsible for the additional interest left on the loan. KPOG also states a concern that there is an ongoing impact of interest expense from other debt that could be paid off or not incurred if KRA were required to repay the Utility the \$891,660 plus interest. Once again, this Commission cannot order KRA to do anything, much less repay the Utility any monies. If the Petitioners believe that they have a justiciable claim against KRA for various monies, they will have to pursue that claim in another forum. It is not that this Commission has not tried to address KPOG's concerns, but rather that the concerns of KPOG oftentimes do not encompass areas that the Commission has the ability to address within its statutory jurisdiction, even if it agreed with KPOG's concerns.

Again, we state that KPOG may not relitigate this issue anyway, since the Commission issued an Order disposing of the "unidentified assets" question in 1992, which was not appealed. The 1992 Order is therefore the law of the case, and the

Petitioners are collaterally estopped from bringing the matter back before the Commission, as well as all the other matters litigated in that case. We do not disagree with the notion that ratemaking is a legislative function, but once that ratemaking takes the form of an Order, the “law of the case” doctrine takes precedence, and the matter may not be relitigated in any case. The doctrine of collateral estoppel applies to the decisions of administrative agencies. See Bennett v. S.C. Department of Corrections, 305 S.C. 310, 408 S.E. 2d 230 (1991). The allegations of the Petitioners with regard to “unidentified assets” are therefore rejected.

The Petitioners next allegation of error relates to availability/building incentive fees. The Petition states that “the Commission failed to properly account for the collection of building incentive fees.” We disagree. Clearly, KPOG simply disputes our view of the evidence in this case, which is fully discussed in Order No. 2000-713 at 31-33. Allegations of “stonewalling” and “circumvention” aside, based on the substantial evidence in the record before us, we reached the conclusions outlined in that Order on this subject. We considered the evidence presented by KPOG, and simply rejected it, which is within our rights as the deliberative body. We also reject KPOG’s allegation of error.

Next, KPOG and the Town disagree with our decision regarding fire hydrants. Once again, the Petitioners are barred by law from raising this issue under the principle of collateral estoppel, since the issue was ruled upon in 1992 in an unappealed Order of this Commission. Even if one considers the merits of the matter, however, the challenge must be rejected. KPOG alleges that because some developers contribute fire hydrants at no

charge to utility companies, KRA should have donated fire hydrants to Kiawah Island Utility, Inc. This is certainly a novel argument, especially since it is based on a survey of 17 utilities. Obviously, there are many more than 17 water utilities in South Carolina. Therefore, such survey evidence is neither compelling, nor persuasive. Once again, KPOG is requesting that this Commission order the developer KRA to reimburse the utility for the costs of the fire hydrants. Once again, such a request falls outside the jurisdiction of this Commission, since we have jurisdiction over only the utility, not the developer. Based on these points, and on our discussion of this matter in Order No. 2000-713, the Petitioners allegation regarding fire hydrants must therefore be rejected.

In addition, the Petitioners challenge this Commission's findings with regard to the delineation of transmission versus distribution lines, stating that we allowed certain costs to be absorbed by the ratepayers as opposed to the developer. First, we would note that this matter was also ruled upon in our unappealed 1992 Order. Second, we must state that we considered KPOG's testimony on this matter during the rate case, and specifically rejected it, based on other more credible evidence presented in the case. We would also note that we thoroughly analyzed this issue in our Order No. 2000-713 at 36-39, and we continue to rely upon that analysis herein. Again, the principle contention is that the developer should be paying for the lines, based upon a small survey of utilities. We must once again reject the Petitioners' challenge on the transmission-distribution line delineation.

Finally, the Petitioners state that this Commission has improperly allowed the Utility to cross-collateralize its assets on a loan from NationsBank to KRA. We again

rely on our discussion in Order No. 2000-713 at 39-40, and in our 1992 Order. We would also note that KPOG admits in the Petition that it is not asserting that cross-collateralization has negatively affected the Utility, but it is “concerned about what would happen in the future if KRA becomes overextended or some unforeseen natural disaster takes place.” Such assertions are mere speculation on the part of KPOG, and are not based on any of the evidence in the record before this Commission. As we stated in Order No. 2000-713, there is no proof in the record that the cross-collateralization/cross default provisions of the NationsBank loan are detrimental to the Utility’s being able to provide quality utility services to its customers at a reasonable rate. We continue to hold, based on the evidence, that these loan provisions are commercially responsible and were necessary for the Utility to obtain financing for necessary expenses. We therefore reject the Petitioners final allegation of error.

In addition, although the Petitioners correctly note that in Docket No. 98-328-W/S, Order No. 2000-0401, this Commission directed that a management audit of KIU be coordinated through the parties, we may not postpone our consideration of the Petitioners Petition for Rehearing and Reconsideration of Order No. 2000-713. S.C. Code Ann. Section 58-5-330 (1976) requires that we make a determination on such a Petition within thirty days after it is submitted. Therefore, we are unable to honor the Petitioners’ request, and are bound by law to issue a ruling on the Petition.

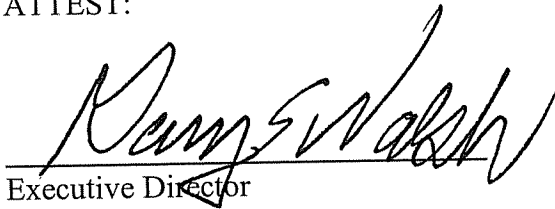
In any event, the Amended Petition is denied, because of the above-stated reasoning. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:



Chairman

ATTEST:


Executive Director

(SEAL)